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Supreme Court, U.S.
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NO. _____

In the
SUPREME COURT OF THE UNITED STATES

Shlishey The Best, Inc., as Trustee for the
Twice As Nice 2x22 Land Trust,

Petitioner

v.

Option One Mortgage Corporation,
Deborah Douglas and Emmet Douglas,

Respondents

On Petition for Writ of Certiorari to the
Second District Court of Appeal
of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Florida trial court violated Due Process by refusing to conduct an evidentiary hearing prior to setting aside a Certificate of Title to land purchases at a foreclosure sale, over timely objections of counsel.

U.S. CONST, 5th, 14th AMENDMENTS.

2. Whether Florida's practice of issuing "Per Curiam, AFFIRMED" decisions in first tier appeals violates Due Process and impermissably displaces the burden for second tier review to the United States Supreme Court.

U.S. CONST. ART. III; 5th, 14th AMENDMENTS.

CORPORATE STATEMENT

Petitioner, SHLISHEY THE BEST, INC., is a closely held Florida corporation, with no parent company or subsidiaries.

Twice As Nice 2x22 Land Trust consists of the single-family home in question, with SHLISHEY THE BEST, INC., as Trustee, and individual beneficiaries, who are principals in SHLISHEY. *

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* A main purpose of placing properties in land trusts in Florida is to limit potential liability to the asset. Land trusts are inexpensive and easier to create, as opposed to corporate entities.

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Option One Mortgage Corporation;
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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
SECOND DISTIRCT COURT OF APPEAL
OF FLORIDA

Shlishey the Best, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Second District Court of Appeal of Florida, affirming, per curiam, the order of the Circuit Court of the 12th Judicial Circuit, Sarasota County, Florida.

OPINIONS BELOW

The opinion of the Second District Court of Appeal of Florida (App. A-1, A-3) and the order of the Circuit Court of the 12th Judicial County of Florida (App. A-5) are unreported.

JURISDICTION

The Second District Court of Appeal of Florida entered its judgment on November 8, 2010, (App. A-1). After a timely filed motion for rehearing, the District court of appeal entered its order denying rehearing on December 3, 2010. (App. A-3) Under Florida law, the "Per Curiam, Affirmed" decision and the order denying rehearing may not be appealed to the Florida Supreme Court, by direct appeal or "all writs" powers. See, R. J. Reynolds Tobacco Co. v. Kenyon, 882 So.2d 986 (Fla. 2004). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

NOTIFICATION OF POSSIBLE APPLICATION OF 28 U.S.C . §2403(b)

As the second question presented challenges the constitutionality of the application of Florida's treatment of per curiam affirmed decisions regarding Federal questions, pursuant to the Florida Constitution, three copies have been served on the Attorney General of Florida, as required by Rule 29.4(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V. Criminal actions – Provisions concerning – Due process of law and just compensation.

No person shall * * * be deprived of life, liberty, or property, without due process of law * * *

Amendment XIV § 1. Citizenship – Due process of law – Equal protection.

* * * No state shall make or enforce any law which shall abridge the priveleges for immunities of citizens of United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

§45.031, Fla.Stat. (2008): Judicial sales procedure. -

Section 45.031, of the Florida Statutes provides in pertinent part:

In any sale of real or personal property under an order or judgment, the procedures provided in this section and ss. 45.0315-45.035 may be followed as an alternative to any other sale procedure if so ordered by the court.

* * *

(4) CERTIFICATION OF SALE. — After a sale of the property the clerk shall promptly file a certificate of sale and serve a copy of it on each party in substantially the following form: [FORM]

(5) CERTIFICATE OF TITLE. — If no objections to the sale are filed within 10 days after filing the certificate of sale, the clerk shall file a certificate of title and serve a copy of it on each party in substantially the following form: [FORM]

(6) CONFIRMATION; RECORDING. — When the certificate of title is filed the sale shall stand confirmed, and title to the property shall pass to the

purchaser named in the certificate without the necessity of any further proceedings or instruments. The certificate of title shall be recorded by the clerk.

* * *

(8) VALUE OF PROPERTY. — The amount of the bid for the property at the sale shall be conclusively presumed to be sufficient consideration for the sale. Any party may serve an objection to the amount of the bid within 10 days after the clerk files the certificate of sale. If timely objections to the bid are served, the objections shall be heard by the court. Service of objections to the amount of the bid does not affect or cloud the title of the purchaser in any manner. If the case is one in which a deficiency judgment may be sought and application is made for a deficiency, the amount bid at the sale may be considered by the court as one of the factors in determining a deficiency under the usual equitable principles.

Florida Rules of Civil Procedure: Rule 1.540.(b)

Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) that the

judgment or decree is void; or (5) that the judgment or decree has been satisfied, released, or discharged, or a prior judgment or decree upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or decree should have prospective application. The motion shall be filed within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment, decree, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or decree or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order, or proceeding or to set aside a judgment or decree for fraud upon the court.

Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment or decree shall be by motion as prescribed in these rules or by an independent action.

Florida Constitution, Art.V, §b (3)

(b) JURISDICTION. — The supreme court:

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

STATEMENT

A. Facts leading up to the current proceedings

Petitioner. Shlishey the Best, Inc., as Trustee, is a small real estate investment/management company, concentrating on single family homes, primarily in Sarasota County, Florida. On October 27, 2008, Shlishey was the high bidder at a properly noticed and advertised mortgage foreclosure sale. (App. A-10) Respondents, Deborah Douglas and Emmet Douglas, were the mortgagors, defendants, in the foreclosure. Petitioner paid the price bid and costs incident to the sale, November 7, 2008. The County Clerk issued a Certificate of Title, as no objection to the sale was filed within 10 days. pursuant to the procedures of §45.031, Fla.Stat., supra. (App. A-12)

B. Proceedings below

Respondent, Option One Mortgage Corp. (Option One), was the Plaintiff in the foreclosure suit. After the time had expired to appeal the Certificate of Title, Respondent, OPTION ONE, filed a motion to set aside the title and vacate the sale pursuant to Fla.R.Civ.P. 1.540(b). (See, App. A-4)

After non-evidentiary hearings before different Florida Circuit Judges, SHLISHEY'S title was set aside on August 31, 2009. (App. A-4, et seq.)

At the hearing's outset, and to Petitioner's shock, its counsel was informed : "This is not - - this was set by me and its not an evidentiary hearing." (Respondent's counsel, App. A-19)

At each opportunity in the trial court, Petitioner objected to proceeding on affidavits and sought to call witnesses. SHLISHEY was told "at the hearing... * * * when you have an affidavit supporting your motion you do a counter affidavit, you don't cross-examine." (App. A-21) There were more objections and proceeding on objected-to affidavits and counsel's argument during the hearing. (App. A-19, A-21, A-22 - 24, A-27) There were witnesses available, in the courtroom, intending to testify, and not permitted to speak. (See, App. A-19, A-23) In fact, Option One's counsel actually tried to *exclude* SHLISHEY'S tenants from the hearing. (App. A-19)

Faced with losing the property, and its moral obligation to its tenants who were about to lose their home, Petitioner timely filed an appeal of the August 31, 2009, order setting aside the sale to the Second District Court of Appeal of Florida. Petitioner's Due Process contentions, first raised in the trial court, were the subject matter of its appeal. The Florida appellate court issued what is commonly called a "PCA." It contained one line:

Per Curiam, AFFIRMED.

This order was issued on October 22, 2010. (App. A-1) Shlishey timely filed a motion for rehearing and

for a written opinion, under the Florida rules, on November 8, 2010. In this motion, Petitioner raised the constitutional arguments concerning "Per Curiam, AFFIRMED" opinions presented as the second question, herein.

The rehearing was denied on December 2, 2010. It states only:

"Appellant's motion for rehearing and request for written opinion is denied."

(App. A-3)

REASONS FOR GRANTING THE PETITION

I. An evidentiary hearing is required by Due Prossess before setting aside a Certificate of Title

In Florida, a purchaser at a foreclosure sale has a right to obtain title to the property unless objections to the sale are timely filed within 10 days. Title is acquired by issuance of a Certificate of Title, which is automatically issued by the Clerk unless objections are timely filed. See, §45.031(5), Fla.Stat. (2008). The filing of a Certificate of Title, in Florida, is an "automatic confirmation of title when the statutory procedures have been scrúpulously followed." R.K. Cooper Construction Company v. Fulton, 216 So.2d 11, 13 (Fla. 1968). It passes "good title" to the property. Id., at 12. A Certificate of Title is thus the equivalent of a *deed*.

A Certificate of Title also has the effect of a final, conclusive judgment, and may be appealed. Commercial Laundries, Inc. v. Golf Course Towers Assocs., 568 So.2d 501, 503 (Fla. 3d DCA 1990), It is intended to cure all irregularities, misconduct, and unfairness in the making of the sale. Confederate Pt. Ptnrs., Ltd v. Schatten, 278 So. 2D 661, 662 (Fla. 1st DCA 1973).

A lot happens after one gains title to a property. The title holder can do anything lawful with it as desired: lease it, occupy it, use it, farm it, let it lie in fallow. Liens, if any, to the property must be cleared to prevent further foreclosures. If there is a Homeowners association, the dues must be paid. A certificate of title denotes ownership of the property, carrying with it all of the rights and responsibilities that property ownership entails.

It is apodictic that the recipient of a Certificate of Title has a constitutionally protected property interest. FIFTH, FOURTEENTH AMENDS.. Due Process requires an evidentiary hearing before such property interest is taken away, unless waived. Individual freedom finds tangible expression in property rights. U.S. v. James Daniel Good Real Property, 510 U.S. 43, 61 (1993).

Fla.R.Civ.P. 1.540(b) is the method commonly used to set aside judicial sales in Florida, even after issuance of a certificate of title.[1] This Rule is

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1 E.g., American Nat'l Bank v. Lau, 268 So.2d 567 (Fla. 2d DCA 1972), cert. den., 273 So.2d 81 (Fla. 1973).

substantially similar to F.R.C.P. 60(b)-(e).[2] The standard of review, both under the Federal and Florida rules, is for abuse of discretion. Florida courts correctly state that the trial judge has broad discretion in equity to vacate a judgment, though it is not unlimited. Rude v. Golden Crown Land Dev. Corp., 521.So. 2d 351, 353 (Fla, 2d DCA 1988).

The discretionary decision of a judge presupposes an evidentiary hearing to determine the facts. In Rude, the Florida Second District correctly stated that the moving party must produce sufficient evidence of the mistake, accident, excusable neglect, or surprise pursuant to Rule 1.540(b), before the court's equity jurisdiction may be evoked. Without such evidence, vacation of a final judgment is an abuse of discretion.

The Federal courts uniformly conduct evidentiary hearings when applying F.R.C.P. 60(b)-(e), unless there are stipulated statements of fact, sufficient testimony and evidence from earlier proceedings in the case,[3] or a waiver.

Florida courts have not specifically held that an evidentiary hearing is required when setting aside a certificate of title. Florida appellate courts have, however, reversed and remanded cases

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2 The rules practically mirror each other, however the Federal Rule has been expanded to include "any other reason that justifies relief," including relief under 28 U.S.C. §1655. F.R.C.P. 60(b)(6) and (d)(2).

3 See, e.g., Matter of Bleaufontaine, Inc., 634 F.2d 1383, 1388 (5th Cir. 1981).

numerous times for failure to conduct an evidentiary hearing in other contexts of Fla.R.Civ.P. 1.540(b).[4]

The order setting aside the title wrongly states that the "facts" are "undisputed." The Florida circuit judge in the present case refused to permit an evidentiary hearing, over the argument and objections of Petitioner's counsel. (App. A-19--27). Counsel for OPTION ONE argued that no evidentiary hearing was needed and argued to shift the burden of going forward with the evidence onto SHLISHEY. (App. A-19, A-25--27) Petitioner objected that the burden of proof was on OPTION ONE. (App. A-27) Florida and Federal Courts are uniform that the burden of proof to go forward with a motion to set aside a sale is on the movant.[5]

Refusing to hold an evidentiary hearing before determining the facts is, per se, a gross abuse of discretion. It is wrong to refuse to let a property owner call witnesses. To prevent confrontation of those who would speak, through self-serving affidavits is wrong. It is wrong to give no

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4 E.g., Depelisi v. Wishner, 15 so.3d 808 (Fla. 4th DCA, 2009) (vacating the default judgment); Schleger v. Stebelski, 957 So.2d 71 (Fla. 4th DCA, 2007) (order denying motion to vacate order for rehearing); Southeast Mtg. Co. v. Andrews 561 So.2d 33 (Fla. 4th DCA, 1990) (dismissal of motion to set aside foreclosure sale); Sperdute v. Household Realty Corp. 585 So.2d 1168 (Fla. 4th DCA, 1991) (final judgment of foreclosure). Mansour v. Bruce Balk, A.I.A., P.A., 705 So.2d 968 (Fla.2d DCA, 1998) (whether facts set forth in affidavits supporting setting aside defaults were provable).

5 E.g., Richardson v. Chase Manhattan Bank, 941 So.2d 435, 437 (Fla.3d DCA, 2006) ; also see, infra. Lomas & Nettleton, 884 F.2d 965.

opportunity to show all the unseen expenses weighed in making the bid which won the sale. Avoidance of any evidence of the property's true value, is wrong. It is wrong to let "the bank" keep the innocent purchaser's money and money spent securing and improving the property. To silence the voices of innocent tenants wanting to speak about the hardships of the loss of their home on short notice, is wrong.

What protects our citizens against these wrongs? The FIFTH AMENDMENT right to be heard. What makes this right meaningful? A chance to take testimony and cross-examine; a chance to present evidence and to argue upon the truth adduced; a chance to go it publicly.

Statements by bank's counsel and uncross-examined affidavits prepared in the silence of one's room, used by a court to make findings of fact, over objection, is the core antithesis of our American System. The most basic, self-evident tenet of our democracy is this: Before you are deprived of your life, liberty, or property, you have a right to a chance to prove it should not be taken away. It is the one principle that all who love our County agree upon, Right and Left, Liberal and Conservative, Republican and Democrat, landlord and tenant, poor man and rich man. It is possible to make a string citation for the next few pages on this point!

That is why it is so appalling that the Florida Circuit court in Sarasota County, Florida, can, straight-facedly, state in its order that the facts were

"undisputed." (App. A-5) Ironically, of course, they ARE undisputed! There was no evidentiary hearing. The wording should have been "not permitted to be disputed," instead of "undisputed."

The Respondent, below, actually argues that whether or not to take testimony on a Fla.R.Civ.P. 1.540(b) motion is a *discretionary* matter! It is not. The FIFTH AMENDMENT is not discretionary. The decision, *after* the facts are adduced, is discretionary.

If this Court fails to act, the practical results are this: Respondent, OPTION ONE, gets to return a vacant property to the defendants, DOUGLAS; there will be a new foreclosure sale at some time in the future; the current tenants will become tenants at sufferance and must vacate the property within 24 hours of a writ of possession; more litigation will ensue for SHLISHEY to attempt to recover its costs and monies paid in property ownership. An appropriate evidentiary hearing could have resolved all of these issues.

This was not a summary judgment hearing. It was a motion to set aside a confirmed Certificate of Title, with the weight of a judgment and the equivalency of a deed. It is not a trial by affidavit.

Much will quite likely be made of the so-called "facts" set forth in the local court's order. (App. A-5--7). The truth, however, is that these "facts" are not facts at all. They consist of unsworn statements of counsel and self-serving assertions made in

affidavits, with no confrontation, no cross-examination. The Petitioner is prepared to make a compelling argument after the true facts are adduced, yet no opportunity to do so was afforded by the local court. For instance, had the full facts been brought into evidence, Petitioner could argue that the current case is not unlike Lomas & Nettleton, Co. v. Wisely, 884 F.2d 965 (7th Cir. 1989) (applying Indiana law). In Lomas, the lender attempted to set aside a sale based on its attorney's unilateral mistake and failed to prove value. The Seventh Circuit reversed and reinstated the title. How can one so argue when there is no proper evidence in the record?

This Court has long held fast to the proposition that, absent misconduct by the purchaser, or other strongly compelling circumstances, judicial sales should be upheld. E.g., Koontz v. Northern Bank of Ky., 83 U.S. 465, 16 Wall. 196 (1872); Mason v. Duncanson, 166 U.S. 533 (1897). If there is no chance to adduce testimony and submit tangible evidence, how can the purchaser argue the equities of the sale?

The principle that Due Process requires an evidentiary hearing before setting aside a deed, a judgment, a certificate of title; before taking a parcel of land from one private party to hand it to another. This principle is so basic that this Court should grant certiorari and summarily reverse and remand the case to the Circuit Court of the 12th Judicial Circuit of Florida for an evidentiary hearing.

II. Florida's "PCA" system and the shifting of the burden to this Court for second tier review

This case should not be here in this Court. Denials of Due Process are fundamental error that are supposed to be corrected on the State court level. So why are we here? We are here because in 1980, the Florida Supreme Court's jurisdiction was severely restricted by an amendment to the Florida Constitution. Fla.Const.Art. V, §3(b) If a citizen's rights are infringed by the State in the trial court, and the first, and essentially only, level of appeal--the Florida district courts of appeal, are silent, then the only place to be heard is here; in the U.S. Supreme Court.

Florida shamelessly admits that the purpose of these State constitutional restrictions are the dramatic increase in workload that the State experienced as it grew exponentially in the latter part of the 20th Century. Jenkins v. State, 385 So.2d 1356 (Fla. 1980).[6] The primary vehicle to accomplish the workload reduction through the amendment was to stop appellate review of what is called in the local parlance, a "PCA." This stands for "Per Curiam, AFFIRMED," which is a type of affirmance without opinion.

Use of a PCA is understandable for disputes over factual issues, discretionary decisions in equity, and the many other run of the mill decisions that

6 The concurrence and dissent to this opinion are also quite informative.

State appellate courts must address, particularly when the appeal is frivolous or pro forma. It is the opposite, however, when constitutional rights and matters of great public importance come into play. If a State wants to seize private property or deny basic FOURTH and FIFTH AMENDMENT rights to prisoners, all a State has to do is this:

1. Deny the right in the trial court;

2. PCA the first level appeal;

3. Gamble that the case either never gets to this Court; or that, with its own ever-increasing caseload, this Court cannot address the wrong because there are so many more important cases to address.

Since appeals in State court are not usually reported by the Press, and the filings in State appellate courts are not subject to the bright light of public scrutiny which cases have in this Court, the potential for abuse is great. The response from the State of Florida, quite naturally, will be: "Trust us," as it has been in the past. Whipple v. State, 431 So.2d 1011, 1015 (Fla. 2d DCA 1983). In Whipple, the Florida District stated:

> "Under our present constitutional scheme, the district courts or appeal engage primarily in the so-called error-correcting function to insure that every litigant receives a fair trial. This frees the supreme court to discharge its

> judicial policy-making function of clarifying the law and promulgating new rules of law."

Id., at 1014. Is this true? Where was the evidentiary hearing before Petitioner's property was taken? How can fundamental Due Process issues be overlooked for a PCA? Similar justifications for the use of PCAs in the Florida District Courts of Appeal are used for not reviewing PCA decisions. Cf., Jenkins and Whipple, supra.

How is this different from any other State scheme to deprive citizens of their rights? Jim Crow laws, poll taxes, coerced confessions, deprivation of an attorney for indigents in criminal cases - - all State expedients which failed and fell to Constitutional scrutiny.

Even before the Florida amendment passed, there were critics of this Florida system, which effectively shifts responsibility to this Court for second tier review of matters which should be handled at the State court level. See, Jenkins, supra.

Florida adopted an amendment to a Rule of Judicial Administration in 1986 to provide for dispositional time limits. In an opinion, concurring in part, and dissenting in part, Florida Supreme Court Justice Ehrlich wrote:

> "At the appellate level, I am

apprehensive that some judges may well sacrifice quality of work to conform to the six months schedule. Peer pressure is a thing of reality. How easy it may be for a judge to recommend a per curiam affirmed, rather than take the time to author a well-deserved opinion, in order to stay within the time standards. I cannot subscribe to the premise that the time within which it takes to get an opinion published is more important than the decision itself and the judicial scholarship of a the written opinion. Chances are judges will not succumb to the easy way of conforming to the time standards, but the temptation is there."

* * *

"I would be less than honest and candid if I did not recognize that there are trial and appellate judges who do not bear their fair share of the judicial labors. Unfortunately, these few seem to stand out in the public view and tarnish the public image of the overwhelming majority of the judiciary who labor long and hard in the judicial vineyard, and at salaries totally incommensurate with their skills and responsibilities, because of their love of the law and because they believe with their heart and soul in the rule of law and know and

> appreciate all too well the great responsibilities of the members of the third branch of government. Those few who do so much harm to the public standing of so many can, and should be appropriately dealt with, and there are present means to do so, but let us admit that they alone do not account for all of the so-called delays in the judicial process. As long as our state is growing with new people , new businesses and new relationships, the teachings of history leads me to the belief that there will always be a hiatus between the manpower and material needs of the judiciary and what the legislative branch of government is willing to recognize and provide. We shall continue to have judicial delays in our state as long as it continues to grow, because the state needs and will need more judges than the legislature is willing to provide. There will never be a proper balancing of the judicial needs, in my view, so long as the state grows and the people continue to become increasingly cognizant of and assertive if their rights under the law."

Florida Bar Re: Amend. to Rules of Jud. Admin. Rule 2.050 (Time Standards), 493 So.2d 423 (Fla. 1986) (Ehrlich *concurring* in part and *dissenting* in part).

In at least one decision, members of this Court have also voiced displeasure with Florida's system. See, Florida v. Rodriguez, 469 U.S. 1, 9-12 (1984) (Marshall, J. dissenting).

Frankly, 30 years after the passage of the Florida amendment, it is still somewhat of a legal secret that a savvy lawyer can petition for certiorari to this Court when there is a violation of a Constitutional right or other important Federal question, after a Florida district court of appeal PCA's the case. Even among Florida members of the Bar of this Court, it is relatively unknown. Very informal polling by the undersigned has reflected that, outside of the Florida Attorney General's office and a few appellate lawyers, most Florida Bar members do not realize they can. It is a bubble likely to burst, because all it takes is a law review or bar news article; a disgruntled recipient of a PCA opinion with the wherewithal to do good legal research and an internet posting; a press report when the news is slow.

In those 30 years, meanwhile, there has been an unbroken line of causes further restricting the cases the Florida Supreme Court reviews, relying on the amendment: Jenkins, supra, (1980), shut down the practice of looking behind the PCA to the record; then appellate dismissals (1980); then "all writs" powers to "evade" Jenkins (1999); then per curiam denials (2002). Stallworth v. Moore, 827 So.2d 974 (Fla. 2002). R.J. Reynolds, supra, extended it to motion denials (2004). Then PCA concurrences declaring a statute invalid precluded review. Byrd v.

State, 880 So.2d 616 (Fla. 2004). Then it went to "unelaborated per curiam decisions." Jackson v. State, 926 So.2d 1262 (Fla. 2006).

The entire judicial system in Florida suffers a loss in credibility when one tries to redress injuries to basic rights and advance the law, and one receives a PCA:

> You are wrong, and we are not going to tell you why.

Petitioner's response is simply this: The Bill of Rights is not wrong! Due Process requires an appropriate hearing before life, liberty, or property is taken away.

Likewise, Florida's judicial workload and its Legislature's financial constraints are not reasons to shift the burden to the U.S. Supreme Court to correct simple, but grave, constitutional errors.

The argument is made that this Court's methods are the template. This, they are not. This Court was intended to be the final review on very important matters, after the case wends through the lower courts. A populous State like Florida should not be permitted to pass its workload to this Court.

A simple solution would be a rule stating that matters of constitutional and Federal import require a written opinion in the appellate court of first instance. If a State such as Florida wants to

have a single tier system, sobeit. It only needs an effective way to safeguard rights. PCA opinions and "trust us to look at your case," are not the way to safeguard precious constitutional rights.[7]

This case, unfortunately, is the prime example.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

George J. F. Werner, Esq.
Counsel for Petitioner

1602 East 3rd Avenue, Suite B
Ybor City, Florida 33605
(888) 899-0205 (phone/fax)
GJFW.law@gmail.com

7 The common argument in favor of PCA's is that they are very good when the issues are well-settled or frivelous or would add nothing to the jurisprudence of the State. Petitioner argues that they are very bad when the PCA is opposite to well-settled law, violence of Federal rights, or used arbitrarily or capriciously.

APPENDIX

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

SHLISHEY THE BEST INC., as Trustee for the TWICE AS NICE 2X22 LAND TRUST,

Appellant,

v.

OPTION ONE MORTGAGE CORPORATION; DEBORAGE DOUGLAS; EMMET DOUGLAS; JOHN DOE; JANE DOE AS UNKNOWN TENANTS IN POSSESION OF THE SUBJECT PROPERTY,

Appellees.

Opinion filed October 22, 2010.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Sarasota County; Nancy K. Donellan, Senior Judge.

George J. F. Werner, Tampa, for Appellant.

Hinda Klein of Conroy, Simberg, Ganon, Krevans, Abel, Lurvey, Morrow & Schefer, P.A., Hollywood, for Appellee Option One Mortgage Corporation.

No appearances for Appellees Deborah Douglas; Emmet Douglas.

PER CURIAM.

Affirmed.

WHATLEY, MORRIS, and BLACK, JJ., Concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA SECOND SITRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

December 3, 2010

CASE NO.: 2D09-4585
L.T. No.: 2007-CA-011268-SC

Shlishey The Best, Inc., Et Al.,	v.	Option One Mortgage Corp., Et Al.,
Appellant/Petitioner(s)		Appellee/Respondent(s)

BY ORDER OF THE COURT:

Appellant's motion for rehearing and request for written opinion is denied.

I HEREBY CERTIFY that the foregoing is a true and correct copy of the original court order.

Served:

George J. F. Werner, Esq.
Marshall C. Watson, Esq.
Karen Rushing, Clerk
Hinda Klein, Esq.
Dale L. Friedman, Esq.

me

/S/ James Birkhold
James Birkhold
Clerk

IN THE CIRCUIT COURT OF THE
12TH JUDICIAL CIRCUIT, IN AND FOR
SARASOTA COUNTY, FLORIDA
CIVIL DIVISION

OPTION ONE MORTGAGE
CORPORATION,
Plaintiff,

vs. CASE NO.:2007 CA 011268 SC

DEBORAHE DOUGLAS; EMMETT
DOUGLAS; JOHN DOE; JANE DOE
AS UNKNOWN TENANTS IN
POSSESION OF THE SUBJECT
PROPERTY,
Defendants.
_____/

ORDER ON PLAINTIFF'S MOTION [TO] VACATE CERTIFICATE OF SALE AND CERTIFICATE OF TITLE

THIS MATTER is before the Court on Plaintiff Option One Mortgage Corporation's Motion To Vacate Certificate of Sale and Certificate of Title and the Court, having heard the agrument of the parties, reviewed the file, the relevant case law and otherwise being fully advised in the premises, finds as follows:

Parties and Counsel:

Plaintiff Option One Mortgage One ("Option

One") is represented in the post judgment proceedings by Dale Friedman of Conroy, Simberg Ganon, Krevans, Abel, Lurvey, Morrow and Schefer, Hollywood, Florida. Option One is represented in foreclosure proceedings by the Law Office of Marshall C. Watson ("Watson Firm"), Fort Lauderdale, Florida. The foreclosure sale purchaser, Shlishey The Best, Inc. ("Shlishey"), is represented by George J. F. Werner, Clearwater, Florida

Issue:

Is it appropriate, under the facts of this case, to set aside the foreclosure sale, certificate of sale and certificate of title pursuant to the two part test of Rule 1.540(b), Florida Rules of Civil Procedure as articulated by the Florida Supreme Court in Arlt v. Buchanan, 190 So.2d 575 (Fla. 1966)

Findings of Fact:

The following findings of fact are undisputed.

On September 19, 2009, the Court entered a Final Judgment of Foreclosure. As was the foreclosure practice at that time, the attorneys for Option One were advised to be available by telephone in the event a defendant appeared at the hearing to contest the foreclosure. If no defendant appeared, the phone call would not be made and the judgment of foreclosure would be entered. Because no defendants appeared on September 19, 2009, the Judgment was entered without a phone call to

Plaintiff's counsel. The judgment amount was $302,935.42. The attorney on standby was Karen Thompson.

For reasons no one can explain, the Watson Firm did not receive a copy of the Final judgment of Foreclosure which contained the sale date. Because the Watson Firm was unaware of the sale datem the sale proceeded on October 27, 2008 without a representative of either the Firm or Option One being present. The property sold to shlishey for $20,400.00 approximately [6.7]% of the judgment amount and slightly more than 10% of the assessed value. Option One claims that the sale price is grossly inadequate and the failure of Option One to have an opportunity to bid at the sale was due to the inadvertence or mistake of the Watson Firm. Shlishey argues that the sale price was not inadequate and that the Watson Firm waited too long to move to set aside the certificate of title.

On the date of the foreclosure judgment, September 19, 2009, Attorney Karen Thompson with the Watson Firm sent an email to their foreclosure department advising that she did not receive a call from the court and presumed that a final judgment was granted. Sophie Gentles was the clerk in the Watson foreclosure department charged with following up on the emails from the attorneys relating to presumed final judgments. She was charged with entering the judgments and sale dates in the case management system. Ms. Gentles was fired on September 24, 2008[,] for failing to properly

perform her duties. Paula Turner assumed Gentles's duties and searched Gentles's work area for all open foreclosure files to be certain all judgments and sale dates were logged into the system. The Option One file was not located and, despite a wide firm search, to this day has not been found.

The Watson Firm believes the final judgment was never received by the firm because it would have been scanned into their case management system. The pending sale date would also have been posted in the case management system. On November 12, 2008, Jennifer Lipovsky, a paralegal at Watson, received an email from Sue Miller, an employee handling the firm's post judgment systems, notifying her that she had just paid and invoice for a Notice of Sale in the Option One case but that a foreclosure sale date had not been entered into the system. Ms. Lipovsky immediately checked the clerk of the Court docket for Sarasota County and saw the final Judgment had been filed and recorded on September 23, 2008, with a sale date of October 27, 2008. The Clerk's docket also showed that the certificate of title was recorded on Novemeber 7, 2008. Ms. Lipovsky then contacted the Sarasota County foreclosure clerk who confirmed that the property was sold to a third party for $20,400[.00] on October 27, 2008. The assessed value at the time of the sale was $181,500.00.

Conclusions of Law:

The Florida Supreme Court in Arlt v. Buchanan, supra, set out the circumstances under

which equity will set aside a foreclosure sale.

The general rule is, of course, that standing alone, mere inadequacy of price is not [grounds] for setting aside a judicial sale. But where the inadequacy is gross is shown to result [from] any mistake, accident, surprise, fraud, misconduct or irregularity upon the party of either the purchaser or other person connected with the sale, with resulting injustice to the complaining party, equity will act to prevent wrong result. Id at 577

The two part test of Arlt is embodied in Rule 1.540(b) of the Civil rules of procedure. It is under this Rule that Option One seeks to vacate the sale, certificate of sale and certificate of title.

There are numerous Florida appellate cases upholding the trial court's discretionary authority to do equity by setting aside a foreclosure sale. They need not be cited here. It is evident in this case that the sale price of $20,400.00 was grossly inadequate being only [6.7]% of the $302,935.425 judgment amount and slightly more than 10% of the assessed value of $181,500[.00]. Shlishey argues that the sale price was not inadequate because he had to pay back taxes and make other expenditures to make the house habitable. The test of the adequacy of a sale price is to protect the interest of the judgment holder not the purchaser. The first prong under Arlt is present in this case.

The second prong in Arlt requires a showing of

exusable neglect, accident, mistake or fraud going to the sale process. "Even a unilateral mistake which results in a grossly inadequate price is legally sufficient to invoke the court's discretion in setting a sale aside." United Cos. Lending Corp. v. Abercrombie, 713 So.2d 1017 (Fla. 2d DCA 1998) Unilateral mistakes solely within a plaintiff's law firm which result in counsel's absence at the sale have [uniformly] been upheld as sufficient reason to set aside a sale based upon the second prong in Arlt. Alberts v. Federal Home Loan Mortgage Corp., 673 So.2d 158 (fla. 4th DCA 1996); RSR Investments, Inc. v. Barnett Bank of Pinellas County, 647 So.2d 874 (Fla. 2d) DCA 1994); Wells Fargo Financial System Florida, Inc. v[.] GRP Financial Services Corp., 890 So.2d 383 (Fla. 2d DCA 1994). Such unilateral mistakes were present here.

Accoridingly, it is hereby **ORDERED and ADJUDGED**

1. Plaintiff[']s Motion to Vacate Certificate of Sale and Certificate of Title is hereby GRANTED.
2. The Certficate of Sale and Certificate of Title are hereby vacated and quashed.
3. The foreclosure sale shall be reset.

DONE and ORDERED in Chambers, Sarasota County, Florida this 31 day of August, 2009.

/S/ Nancy K. Donellan
NANCY K. DONELLAN, CIRCUIT JUDGE

Transcriber's Note: Typographic errors have been corrected through the use of brackets: [ ]. Service List has been omitted as superfluous.

IN THE CIRCUIT COURT OF THE
12TH JUDICIAL CIRCUIT, IN AND FOR
SARASOTA COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.:2007 CA 011268 SC

OPTION ONE MORTGAGE
CORPORATION,
Plaintiff,

vs.

DEBORAHE DOUGLAS; EMMETT
DOUGLAS; JOHN DOE; JANE DOE AS
UNKNOWN TENANT (S) IN
POSSESION OF THE SUBJECT
PROPERTY,
Defendants.

CERTIFICATE OF SALE

The undersigned, Karen E. Rushing, Clerk of the Court, certifies that notice of public sale of the property described in the final judgment was published in GULF COAST BUSINESS REVIEW a newspaper circulated in Sarasota County, Florida, in a manner shown by proof of publication attached and on OCT. 27, 2008, the property was offered for public sale to the highest bidder for cash. The highest and best bid received for the property in the amount of $ 20,400.00 was submitted by

SHLISHEY THE BEST, INC.,

to whom the property was sold. The proceeds of the

sale are retained for distribution in accordance with the order or the final judgment or law.

WITNESS my hand and the seal of the Court this 27th day of OCT, 2008.

Karen E. Rushing, CLERK OF COURT

By: /S/ Grace Burch
As Deputy Clerk

FILED 27 DAY OCT, 2008
KAREN E. RUSHING, CLERK
By /S/ Grace Burch

IN THE CIRCUIT COURT OF THE
12TH JUDICIAL CIRCUIT, IN AND FOR
SARASOTA COUNTY, FLORIDA
CIVIL DIVISION
CASE NO.:2007 CA 011268 SC

OPTION ONE MORTGAGE
CORPORATION,
Plaintiff,

vs.

DEBORAHE DOUGLAS; EMMETT
DOUGLAS; JOHN DOE; JANE DOE AS
UNKNOWN TENANT (S) IN
POSSESION OF THE SUBJECT
PROPERTY,
Defendants.

RECORDED IN OFFICIAL RECORDS
INSTRUMENT # 2008147239 1 PG
2008 NOV 7 01:59 PM
KAREN E. RUSHING
CLERK OF THE CIRCUIT COURT
SARASOTA COUNTY, FLORIDA
SPOMERLE Receipt#11005555
Doc Stamp-Deed: 142.80

CERTIFICATE OF TITLE

The undersigned, Karen E. Rushing, Clerk of the Court, hereby certifies that a certificate of sale has been executed and filed in the action on 10-27-08, for the property described herein and that no

objections to the sale have been filed within the time allowed for filing objections.

The following property in Sarasota County Florida:

LOT 11, BLOCK 2626, OF THE 52ND ADDITION OF PORT CHARLOTTE SUBDIVISION, ACCORDING TO THE PLAT THEREOF RECORDED IN PLAT BOOK 21, PAGES 13, 13-A, THROUGH 13-NN, INCLUSIVE, PUBLIC RECORDS OF SARASOTA COUNTY, FLORIDA.

was sold to:

Shlishey The best Incorporated as Trustee for the Twice As Nice Number 2X22 Land Trust P.O. Box 19911 Sarasota FL 34276,

WITNESS my hand and the seal of the Court this 7th day of NOV, 2008.

Karen E. Rushing

By: /S/ Suzanne M. Pomereau
As Deputy Clerk

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

APPEAL NO.: 2D09-4585

SHLISHEY THE BEST, INC., as Trustee
for the TWICE AS NICE 2X22 LAND TRUST,

Appellant,

vs.

RECEIVED
NOV 08 2010

OPTION ONE MORTGAGE CORP, et al.,

Appellee.
_____/

APPELLANT'S MOTION FOR REHEARING AND REQUEST FOR A WRITTEN OPINION

Appellant, SHLISHEY THE BEST, INC., as Trustee for the TWICE AS NICE 2X22 LAND TRUST, hereinafter "SHLISHEY," moves for rehearing in the above-styled appeal, and/or that this Court issue a written opinion and states:

1. This appeal was not about whether the trial court, in its sound discretion, may set aside a Certificate of Title. Florida case law is clear that setting aside judicial sales, judgments, orders, and defaults, are within a trial judge's sound discretion, pursuant to Fla. R. Civ. P. 1.540(b).

2. This appeal is about whether the trial court violated fundamental Due Process rights by denying

an evidentiary hearing on a Rule 1.540(b) motion before vacating a Certificate of Title.

3. The motion was determined solely on affidavits attached to the motion, over the objections of SHLISHEY's counsel.

4. There is no case directly on point in the context of setting aside a Certificate of Title, Florida courts have repeatedly held that an evidentiary hearing is required on other types of Rule 1.540(b) motions. E.g., Mansour v. Bruce Balk, A.I.A., P.A., 705 So.2d 968 (Fla. 2d DCA, 1998); Sperdute v. Household Realty Corp. 585 So.2d 1168 (Fla 4th DCA, 1991).

5. As shown in the Initial and Reply Briefs, a Certificate of Title has the force and weight of both a judgment and a deed of real property. The FIFTH AMENDMENT requires notice and an adequate opportunity to be heard *before* property is taken away.

6. Under our Constitution, refusing to hold an evidentiary hearing to determine the facts, before making an order depriving one of their property is, per se, prejudicial.

7. The practical effect of this per curiam affirmance is that Appellee, OPTION ONE, still has the funds disbursed to it from the sale; the title is returned to the original mortgagor, long gone Appellees, DOUGLAS; there will be a new sale at some time in the future; and the current tenants of the property [are] effectively kept silent.

8. Appellant, SHLISHEY, could make no claim for financial reimbursement, because the Appellant's president was not permitted to testify.

9. A written opinion would provide a legitimate basis for review by the Florida Supreme Court, since there is a compelling need for the public to know at what point a judicial sale is final and title to real property is marketable. Furthermore, the administration of justice in this State will be furthered by the resolution of whether an evidentiary hearing is required of the fact finder prior to making the decision to set aside a sale.

10. Appellant intends to petition for certiorari to the United States Supreme Court, based on the constitutional issues raised in this appeal, in the event that no written opinion is filed.

11. In addition, SHLISHEY intends to the challenge the "per curiam, affirmed" procedure in use in Florida, as violative of fundamental Due Process rights. This procedure can be used, as in the present case, to deprive persons of basic human freedoms, such as ownership of private property, enshrined in the Bill of Rights, by simply taking these freedoms away at the trial court level, and then refusing to issue an opinion on appeal.

RULE 9.330 CERTIFICATION OF COUNSEL

12. Pursuant to Fla.R.App.P., I express a belief, based upon a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for Florida Supreme Court review because

A. The Per Curiam Affirmance effectively states that no evidentiary hearing is required under Rule 1.540(b) in the context of setting aside a

Certificate of Title. This conflicts indirectly with prior decisions of this court and other District Courts of Appeal, which have required evidentiary hearings under Rule 1.540(b) when setting aside defaults, default judgments, and modification of support orders. On the undersigned's personal knowledge, there is currently one appeal pending in this District and one in the Fifth District on similar issues in the judicial sale context.

B. This appeal raises constitutional taking and Due Process issues guaranteed by the 5TH and 14TH AMENDMENTS. The Per Curiam Affirmance passes, without opinion, on the constitutionality of the 1.540(b) procedure used in this case and negates the provisions of §45.031(8) Fla.Stat which states that a Certificate of Title passes title without the need for any further proceedings or instruments (the equivalent of a deed).

WHEREFORE, Appellant, SHLISHEY, requests this honorable Court grant rehearing in the above-styled appeal and/or issue a written opinion.

CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P.. 9.210(a)(2)

I HEREBY CERTIFY that the type size used in this motion is Times New Roman 14, as required by Fla. R. App. P. 9.210(a)(2).

CERTIFICATE OF SERVICE

[OMITTED]

/S/ George J. F. Werner

[Signature Block Omitted]

IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT, IN AND FOR
SARASOTA COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO.:2007 CA 011268 SC

OPTION ONE MORTGAGE
CORPORATION,
Plaintiff,
vs.
DEBORAHE DOUGLAS; EMMETT
DOUGLAS; JOHN AND JANE DOE
as unknown tenant (s) in possession
of the subject property,
Defendants.
_____/

[HEARING ON] OPTION ONE MORTGAGE
CORPORATION'S SUPPLEMENTARY
MEMORANDUM IN SUPPORT OF [AND] MOTION
TO VACATE CERTIFICATE OF SALE AND
CERTIFICATE OF TITLE [**EXCERPTS**]

BEFORE:	The Honorable Nancy Donnellan [Senior Judge]
DATE:	August 20, 2009
TIME:	9:37 a.m. to 10:46 a.m.
PLACE:	Lynn N. Silvertooth Judicial Center 2002 Ringling Boulevard Courtroom 6C Sarasota, Florida 34237
REPORTED BY:	Frances Chippendale, CSR Notary Public State of Florida at Large

* * *

[EXERPT FROM PAGE 4]

THE COURT: You may proceed.

MS. FRIEDMAN: Your honor, before we begin, I would like to invoke the Exclusionary Rule. For some reason, Counsel for non-parties, the actual purchaser, has brought whom I believe to be the tenants, who have no reason to be here, and I'm going to ask this Court to exclude them because depending on what happens, they are potentially witnesses if there is an evidentiary hearing set at some point in the - - in the future.

This is not - - this was set by me and it's not an evidentiary hearing.

THE COURT: Well, then I don't think you have the right to exclude them. I understand your position, but I don't think you have the right to exclude them if they aren't - - may not be a named party, but they may be an interested party.

Okay.

MR. WERNER: May I clarify, Your Honor? I was assuming that this was going to be on their attempts to set aside the Certificate of Title. That's supposed to be an evidentiary hearing if they're proceeding under rule 1.540(b).

* * *

[EXERPT FROM PAGES 11 TO 13]

MS. FRIEDMAN: And if you'll forgive me, Your Honor, I am going to simply look at what was filed back in December, because I was a little more prepared today to argue basically his objections, and I certainly can do that, but I'm just going to reference what is in the memorandum.

On September 19, 2008, this Court entered a final judgment of mortgage foreclosure in the amount of $302,935.42, inclusive of interest, costs and fees. The sale was set for October 27, 2008, but due to a litany of mistakes, which I will outline, the Law Office of Marshall Watson, who was retained to represent Option One at the foreclosure, never received a copy of the final judgment from this Court or a sales date advising of the foreclosure sale date for the reasons I'm going to go through and which are supported in the affidavits.

Because Option One was unaware of the sale date, the property sold to the third-party purchaser, Shlishey, for $20,400[.00], approximately [6.7] percent of the property value and slightly more than 10 percent of the assessed value as certified by Sarasota County Property Appraiser, which we attached to our motion.

Essentially, our argument is that because it was a grossly inadequate amount due to a combination of mistakes and unavoidable circumstances resulting in injustice to Option One, that this Court's equitable powers under the case law of ARLT and the case law in every DCA, including the Second, should set it aside.

Now, let me just go through the facts a little bit more, if Your Honor would like me to. As I said, Watson was retained to handle to foreclosure. In preparation for the hearing on Plaintiff's Motion for Final Summary Judgment, Watson prepared the final judgment and submitted it to Judge Bennett on September 9, 2008, 10 days prior to the scheduled hearing on September 19.

And we've attached the affidavit of Tishanie Nelson, the Senior Foreclosure Specialist in Watson's Foreclosure Department to our motion. In addition, the affidavit of Paula Turner, who is the supervisor of that department.

Judge - -

MR. WERNER: If I - - if I may, I - - Your Honor, I do have to object if the affidavits themselves are being entered into evidence in this way, if this is anything more than a summary, because I have not had the right to cross-examine the affiants at this hearing before the Court.

THE COURT: I'm not sure I understand. What you do when you have an affidavit supporting your motion, is you do a counteraffidavit, you don't cross-examine.

MR. WERNER: Your Honor, this isn't a summary judgment hearing. This is a 1.540(b) hearing, they need to file affidavits to support their motion to even get to a hearing.

THE COURT: They had a hearing. I'm asking her just to let me know, because I'm going to pull this file up, I'm going to go through everything, I'm just asking her to tell me what happened.

MR. WERNER: Okay.

* * *

[EXERPT FROM PAGES 24 TO 26]

MR. WERNER: They didn't do that, they still own the property, but now we're at the stage of Option One thinking there wasn't enough money paid at the sale, so now they want to yank back ownership of the property from Shlishey The Best.

Then they're applying a standard - - I have several things to say about the standards they're applying, but I still - - still have more to say about - - about the equities.

Now, that they're limited to Rule 1.540(b), the Court should conduct under 1.540(b), if there's a prima facie motion, which you should be supporting with affidavits, although you don't necessarily need affidavits under 1.540(b) if there's [an] uncontested motion or prima facie motion, just in what's extant in the court's file, I think we have that by looking at the court docket.

So they didn't necessarily need to attach affidavits, but the Court should not be making a ruling as to whether a judgment, or in this case a certificate of title, should be set aside without a full evidentiary hearing.

Motions to set aside judgment, motions to set aside default, always have evidentiary hearings. I've been involved in probably 30 of those types of hearings over the course of my career and every single time we've had an evidentiary hearing. So this is news to me that we don't get a chance to cross-examine these people that are claiming, "Well, we made a mistake and we want the property back." That's news to me.

So the Court - - and the reason we have an evidentiary hearing in a 1.540(b) motion is - - in this type of case, to set aside a certificate of title, is the Court has to balance the equities here. They're saying, Well, you know, we made a bunch of mistakes and so we should get the property back.

Well, there's a renter in that property who has made a home out of this property, he's painted the entire house, and he's here to tell the Court that he did that, and he lives there with his wife and five kids. There - - and I think that is something very important for the equities in this case.

There's the owner of the property, who had to clear a $250 a day lien when he purchases the property - - when the company purchased the property. That lien was running in North Port, $250 a day. He's prepared to testify, because he has extensive experience [in] investing and property management; he's prepared to testify that North Port would not have released that lien had it not been sold to someone other than the bank. The bank would have been paying that $250 a day lien.

There was taxes outstanding, homeowners association dues on the property when it was purchased. All of those things will get testified to in an evidentiary hearing.

THE COURT: But if they're - - if they're claiming that there was a mistake, inadvertence or a mistake, related to their failure to get to the sale, I do not see what the relevance is.

I mean, I'm not discounting what they've done or that it's their home, but you're kind of beyond where the argument is, that's what I'm saying. You're over down the road instead of being at the crossroads where the argument is.

Where the issue is is whether or not they are entitled to have the sale and certificate of title set aside due to their mistake. That's what the issue is.

* * *

[EXERPT FROM PAGES 40 TO 43]

THE COURT: Why don't you just do a Notice of Filing. We'll try and get a copy - -

MS. FRIEDMAN: Certainly.

THE COURT: - - of the Notice of Filing.

MR. WERNER: I - - I do need to make an objection on - - for the record, since I haven't been able to cross-examine the people who wrote the letter or whether it was received or even sent, Your Honor.

THE COURT: Proceed.

MS. FRIEDMAN: If I may deal with that point, since it seems to be a point constantly raised by Counsel.

It is now August, eight months plus since we filed our motion, since we had the hearing. I've never gotten a call, never gotten a request for a deposition, by telephone. Never gotten anything on the part of Counsel showing he represents to this Court he really and want to do. He has a burden, if he represents a client, to get the evidence he says he needs.

It's all been there. We copied him with the December motion. In April we copied him with the supplemental. He sat on his rights until 12 hours before the hearing, 15 hours before the hearing.

It's just as if we were arguing a summary judgment, Your Honor, and we provided you with affidavits and Counsel said, Well, I havn't done - - you know, had time, I should be able to cross-examine them. And the judge would look at him and say, What have you done, Counsel; have you taken a depo; have you done anything?

This pendulum swings in both directions, Your Honor.

Counsel also represented to the Court there are three cases that you can travel under 1.540(b), the case is so stringent. And he cites to the case of Horn. Number 1, we've cited, again, to numerous cases and there's certainly far more than three, just based on the number I've been involved in.

The point made here is, all that has to be done

for equity, to do the right thing, is to meet the criteria. We've met it and Counsel had provided nothing, nothing to oppose is. Not even a single property appraiser that he's obtained to show that the value that the property appraiser from Sarasota County said is wrong. Nothing.

Counsel also argues that this court has to conduct a full evidentiary hearing. He didn't set one, by the way. And, again, not a single case has been set for that proposition. We've done what we are obligated to do. He now has an obligation to do something.

And let's look at some of the cases that stand for that proposition. As soon as I can get my hands on them.

THE COURT: All right, just a moment.

(Discussion held off the record.)

THE COURT: All right.

MS. FRIEDMAN: Your Honor and let me cite, going back to 1938, the case of Critchlow vs. Equitable Life, Supreme Court of Florida, March 10, and it's cited in our memorandum, 180 southern 382.

"The Court: If a petition to set aside the confirmation has been made in the lower court showing mistake, surprise, accident, misconduct, it is - - or some other misconduct, or some other unlawful or unequitable irregularity, it is probable this appeal would be unnecessary."

And what did the Court say, "It had not been

made to appear by the record, by affidavit, or other satisfactory evidence, that full notice was not given and made in conformity with the above order."

* * *

[EXERPT FROM PAGE 45]

MR. WERNER: Well, first of all, Your Honor, the burden of proof isn't on me, it's on them. Now, I understand that they're used to taking defaults and going in and going against unrepresented parties, but the burden of proof is on them because they're seeking to vacate a certificate of title. They're the complaining party.

And for this proposition I sit Esque Real Estate Holdings vs. - - E-s-q-u-e is how it's spelled, for the benefit of the court reporter - - vs. C.H. Consulting, Limited, 940 So.2d 1185, Florida Fourth DCA 2006.

"Whether the complaining party has made the showing necessary to set aside a foreclosure sale is a discretionary decision." It's discretionary to the court if they've made a proper showing, one way or the other.

* * *

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(2)

Supreme Court, U.S.
FILED
MAR 25 2011
OFFICE OF THE CLERK

NO. 10-1076

In the
SUPREME COURT OF THE UNITED STATES

Shlishey The Best, Inc., as Trustee for the
Twice As Nice 2x22 Land Trust,

Petitioner.

v.

Option One Mortgage Corporation,
Deborah Douglas and Emmet Douglas,

Respondents.

On Petition for Writ of Certiorari to the
Second District Court of Appeal
of Florida

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL STATEMENT AND REASONS FOR GRANTING THE PETITION

On the day the Petition for Writ of Certiorari was filed in this Court, the Second District Court of Appeal of Florida issued an opinion in Avi-Isaac v. Wells Fargo Bank, N.A., 36 Fla. L. Weekly D483 (Fla. 2d DCA, Mar. 2, 2011) (reh. pending)(App. 1, et seq.) The Avi-Isaac case was decided by a different panel of the Florida appellate court. The Avi-Isaac case had similar, and less compelling, facts than the case before this Court. The Florida circuit court and judge were the same in both cases, as was the ruling.

The Florida Second District in Avi-Isaac *reversed* on the same Due Process issue which the lower court panel in the case presented had affirmed, per curiam.

The Avi-Isaac decision also supports Petitioner's contentions on the second question presented to this Court, namely that the Florida appellate system is constitutionaly flawed and impermissably burdens this Court. One panel of the Florida appellate court ignores constitutional guarantees of Due Process, leaving no recourse but a petition for certiorari to this Court. The other panel of the same Florida court correctly applies Due Process to require an evidentiary hearing. The first panel's error could have been corrected without involvement of this Court, if there was a procedure in place to bring a plain constituional error to the Florida Supreme Court.

CONCLUSION

This Court should grant the petition for certiorari, and summarily reverse. However, Petitioner urges this Court to consider hearing the second question presented, to correct Florida's placement of the burden for second tier review upon this Court.

Respectfully submitted,

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APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, SECOND DISTRICT
Case No. 2D10-1405

EYAL AVI-ISAAC

Appellant,

v.

WELLS FARGO BANK, N.A.,[etc.], et al.

Appellees.

Opinion filed March 2, 2011.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Sarasota County; Nancy K. Donnellan, Senior Judge.

George J. F. Werner, Ybor City, for Appellant.

Jack R. Reiter and Jordan S. Kosches of Yoss LLP, Miami, for Appellee Wells Fargo Bank, N.A.

No appearance for remaining Appellees.

SILBERMAN, Judge.

Eyal Avi-Isaac appeals the trial court's order

that grants Wells Fargo's "Plaintiff's Motion to Vacate Certificates of Title, Disbursements, and Sale, Set Aside Foreclosure Sale, and Return Third Party Funds and Memorandum of Law in Support Thereof" (motion to vacate). Because the trial court did not conduct an evidentiary hearing on Wells Fargo's motion to vacate, we reverse and remand for further proceedings.

A final summary judgment of foreclosure determined that Wells Fargo, the mortgagee, was owed $192,664.97. The foreclosure sale was scheduled for September 9, 2008. Wells Fargo contends that during efforts to resolve the dispute with Mr. Byrd, the mortgagor, it faxed a request to cancel the sale to the court. The sale occurred despite the request. Wells Fargo was not present at the foreclosure sale, believing it had been canceled. Avi-Isaac purchased the property at the foreclosure sale for $2000. It is undisputed that at the time of the foreclosure sale, the assessed value of the property was $100,600.

On September 15, 2008, Wells Fargo served on Avi-Isaac "Plaintiff's Objection to Sale and Motion to Return Third Party Funds, Vacate Certificate of Sale and Set Aside Foreclosure Sale" (the objection). The objection was not docketed, however, until December 2, 2008. Wells Fargo contends that the document was sent directly to the presiding judge's chambers and that it was not docketed in accordance with Florida Rule of Civil Procedure 1.080(e). Because the clerk of court did not realize that there was a pending objection, it issued a certificate of title

to Avi-Isaac. See §45.031(5), Fla.Stat. (2008) (providing that "[i]f no objections to the sale are filed within 10 days after filing the certificate of sale, the clerk shall file a certificate of title").

A hearing on Wells Fargo's objection had been set for December 1, 2008, but was canceled. Wells Fargo alleges that it had been in contact with Avi-Isaac to negotiate a settlement and set aside the sale. Wells Fargo asserts that the negotiations came to a standstill, resulting in Wells Fargo filing its motion to vacate. The motion to vacate cites to Florida Rule of Civil Procedure 1.540(b) and addresses the provision which allows for relief from a proceeding based on "mistake, inadvertence, surprise, or excusable neglect." Fla.R.Civ.P. 1.540(b). The motion also relies upon Arlt v. Buchanan, 190 So. 2d 575, 577 (Fla. 1966), which provides that equity may act to set aside a foreclosure sale when (1) the foreclosure sale price was grossly inadequate and (2) the inadequacy of the price resulted from a "mistake, accident, surprise, fraud, misconduct or irregularity" in connection with the sale that caused injustice to the complaining party. See Also United Cos. Lending Corp. v. Abercrombie, 713 So. 2d 1017, 1018 (Fla. 2d DCA 1998) (quoting Arlt, 190 So 2d at 577).

On August 18, 2009, Wells Fargo served a copy of Daid A. Roger on Avi-Isaac's counsel. Ms. Roger indicated in her affidavit that she faxed the request to cancel the foreclosure sale to the clerk of court. Attached to the affidavit is a copy of the fax transaction report. Roger also indicated that she

supervised the dispatch by overnight delivery of Wells Fargo's objection to the sale. Attached to the affidavit are copies of the UPS proof of dispatch on September 16, 2008, and a copy of a UPS proof of delivery on September 17, 2008.

A hearing was held on the motion to vacate on August 21, 2009. At the hearing, Avi-Isaac argued that a certificate of title had been issued, that Wells Fargo was proceeding under rule 1.540(b), and that he was entitled to an evidentiary hearing, but that "all we have had is an affidavit filed at the last minute." He argued that there had "been no testimony or no opportunity to cross-examine, particularly on the UPS mailing." Avi-Isaac stated that no notice of cancellation of sale was filed with the clerk and that a Sarasota County administrative order required that the circuit judge order the cancellation of the sale. He further asserted that he could not file a counter-affidavit to Roger's affidavit saying that the notice was faxed when the court had no record of it. Avi-Isaac argued that Wells Fargo's counsel was a mortgage foreclosure plaintiff's firm and should have known how to cancel a sale and to follow up to check that it was done.

The trial court stated at the hearing that the problem with the foreclosure sale was not the mistake of the law firm but the mistake of the court and characterized it as an inherently defective sale. The trial court granted the motion to vacate and found that there was notice "given to the Clerk that somehow or other didn't get to the foreclosure clerk." The trial court further found that Wells Fargo met

its burden under rule 1.540 and the two-pronged test set out in the Arlt line of cases.

Our standard of review on the trial court's determination of whether Wells Fargo made the necessary showing to set aside the foreclosure sale is for a gross abuse of discretion. See Palacios v. Fla. Funding Trust, 32 So. 3d 167, 170 (Fla. 2d DCA 2010); Abercrombie, 713 So. 2d at 1018. A purchaser at a foreclosure sale is entitled to notice and an opportunity to be heard on a motion to vacate the sale. See Shlishey the Best, Inc. v. CitiFinancial Equity Servs., Inc., 14 So. 3d 1271, 1275 (Fla. 2d DCA 2009). And "it is reversible error for a trial court to deny a party an evidentiary hearing to which he is entitled." Sperdute v. Household Realty Corp., 585 So. 2d 1168, 1169 (Fla. 4th DCA 1991) (determining that the trial court erred in not permitting the defendants to testify regarding the subject of notice at the hearing on their motion to vacate a default final judgment of foreclosure). Of course, "[n]either the submission of affidavits nor argument of counsel is sufficient to constitute an evidentiary hearing." Id. The court in Sperdute determined that "by denying the Sperdutes' request to testify at the evidentiary hearing on their motion to vacate the default by final judgment, the trial court effectively denied them an opportunity to be heard." Id.

In Monsour v. Balk, 705 So. 2d 968, 969 (Fla. 2d DCA 1998), this court addressed the failure to hold an evidentiary hearing on a motion for relief from judgment. This court determined that the trial

court erred by not holding an evidentiary hearing to determine whether the movant could prove the facts alleged in his affidavit regarding insufficient service of process. Id.; see also Estate of Willis v. Gaffney, 677 So. 2d 949, 951 (Fla. 2d DCA 1996) (reversing the denial of a motion for relief from final judgment and remanding for an evidentiary hearing so that the trial court could determine the credibility of the allegations contained in the affidavit); Deplisi v. Wishner, 15 So. 3d 808, 810 (Fla. 4th DCA 2009) (determining that the plaintiff was entitled to an evidentiary hearing on his rule 1.540 motion to vacate the dismissal of his complaint in order to address whether the plaintiff had received notice of hearings).

Here, the trial court relied on Roger's recently filed affidavit to determine that the foreclosure sale was inherently defective. Avi-Isaac objected to the trial court not conducting an evidentiary hearing and argued that he could not cross-examine the representative from the law firm regarding the matters asserted in the affidavit. Although the trial court conducted a hearing on the motion, Avi-Isaac did not have a meaningful opportunity to be heard when he was denied an evidentiary hearing where he could contest the facts alleged in the affidavit. Therefore, we reverse the trial court's order and remand for an evidentiary hearing on Wells Fargo's motion to vacate.

Reversed and remanded.

NORTHCUTT and VILLANTI, JJ., Concur.